

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

AND

Docket No. 168,541

ORDER

Both the respondent and the Kansas Workers Compensation Fund request review by the Appeals Board of an Award, dated February 25, 1994, entered by Administrative Law Judge Shannon S. Krysl. This matter came on before the Appeals Board for oral argument in person in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, Thomas E. Hammond appearing for James B. Zongker of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Douglas C. Hobbs of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Becky C. Hurtig appearing for Andrew E. Busch of Wichita, Kansas.

RECORD & STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award of February 25, 1994.

ISSUES

The respondent appeals raising the following issue:

- (1) Whether the claimant suffered personal injury arising out of and in the course of his employment with the respondent.

The respondent and the Kansas Workers Compensation Fund both appeal the following issue:

- (2) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the whole record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

The Administrative Law Judge found the claimant to be permanently totally disabled as a result of his work-related accidental injury pursuant to K.S.A. 1991 Supp. 44-510c(a)(2). Respondent argues that the claimant has failed to present evidence that proved he suffered a work-related accidental injury while employed by the respondent during the period of January 1992 through June 30, 1992. Respondent and the Kansas Workers Compensation Fund both contend that, even if it is found that claimant's injuries are work related, any permanent disability should be limited to functional impairment as the claimant failed to present credible evidence to prove that he suffered permanent partial general work disability or permanent total disability.

The Appeals Board finds and concludes that the Administrative Law Judge's Award should be affirmed in all respects. The Appeals Board also concludes that the Administrative Law Judge's findings of fact and conclusions of law are correct and well reasoned and are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the findings and conclusions set forth below.

(1) Claimant alleges that between January 1992 and June 30, 1992, his work activities, while employed by the respondent, permanently aggravated pre-existing conditions in his low back and knees. Claimant argues that as a result of this permanent aggravation he is permanently totally disabled as he is incapable of engaging in any type of substantial and gainful employment. See K.S.A. 1991 Supp. 44-510c(a)(2). On the other hand, respondent contends that the claimant has failed to prove his claim and has suffered no permanent disability as a result of performing his work duties on the dates alleged. During oral argument before the Appeals Board, the Kansas Workers Compensation Fund joined in the respondent's argument and position in regard to this case.

On the date of the Regular Hearing, May 24, 1993, claimant was fifty-seven (57) years of age and had been employed by the respondent for twenty-nine (29) years in June of 1992, the last month that he worked. The first two and one-half years (2½) he worked as a sheet metal worker. He then spent the next twenty-five (25) years as a maintenance pipefitter/plumber and the last year and one-half (1½) of his employment he was a boilermaker. However, during the twenty-five (25) years he held the pipefitter/plumber classification, he was a full-time chairman of the machinist union from 1976 to 1988, a sedentary job.

Claimant suffered various injuries, both work related and non-work related, to his back and both knees, prior to the problems he related to his work activities in 1992. In 1969, claimant had surgery on his low back at L5-S1 for nerve root decompression. At that

time, Dr. Gregg Snyder released him with a permanent restriction of no lifting over fifty (50) pounds. Another low back surgery was performed in 1982 by Dr. Tejano, who performed a decompression laminectomy at L4-5 and fusion of L4 through S1. Claimant was again released for work with the permanent restriction of no lifting over fifty (50) pounds. Beginning in 1986, Dr. Murphy first performed arthroscopic surgery on the claimant's left knee for a torn medial meniscus. Dr. Murphy repaired another meniscus tear in 1987, this time in reference to the claimant's right knee. In 1988, Dr. Murphy again performed arthroscopic surgery on the claimant's right knee for a torn meniscus. As a result of claimant's present complaints, Dr. Murphy performed surgery on claimant's right knee on May 11, 1992, for degenerative tear of the medial meniscus and degenerative arthritis.

Claimant testified that his everyday work activities, while employed by the respondent between January 1992 and June 1992, worsened his pain in both his back and knees. After his right knee surgery of May 11, 1992, claimant returned to a job where he could sit down and occasionally stand up to clean out bins. Claimant asserts that he still had pain and could not perform even this job. Claimant was not working at the time he testified. He was also wearing a back brace to protect his low back. He continued to have pain in his low back that caused tingling in his right leg and foot. If he lifts, bends or twists he has back pain. His knees hurt if he squats or kneels. Walking over one-half (½) mile causes increased pain in both his low back and knees. After he sits for approximately fifteen (15) minutes he has to get up because of the pain.

Duane Murphy, M.D., orthopedic surgeon; Teresa Reynolds, M.D., rheumatologist; Stephen Ozanne, M.D., orthopedic surgeon; and, Ernest R. Schlachter, M.D., all testified in this case in reference to causation, physical impairment and restrictions. In regard to the question of whether claimant's work activities permanently aggravated or accelerated his pre-existing low back and knee conditions, all of the physicians concluded that either claimant's previous low back fusion or his arthritic condition in his knees was permanently aggravated by his work activities on the dates alleged.

The Appeals Board finds from the evidence presented, through the claimant's testimony and the medical testimony of the physicians, that claimant's work-related activities permanently aggravated claimant's pre-existing low back and knee conditions causing him permanent disability. A pre-existing condition that degenerates or worsens as a result of the worker's usual job tasks constitutes an accident within the meaning of the Workers Compensation Act. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). If a worker's pre-existing condition is aggravated by a compensable injury, the worker is entitled to compensation for the total resulting disability caused by the aggravation. Baxter v. L. T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987).

(2) The next question to be answered is whether claimant's work-related injuries resulted in permanent total disability or permanent partial general disability. Permanent total disability exists when a work-related accidental injury has rendered the claimant completely and permanently incapable of engaging in any type of substantial and gainful employment. Grounds v. Triple J Constr. Co., 4 Kan. App. 2d 325, 330, 606 P.2d 484, rev. denied 227 Kan. 927 (1980). On the other hand, the test for permanent partial general disability is the extent, expressed as a percentage, to which the claimant's ability to perform work in the open labor market and his ability to earn comparable wages have been reduced, taking into consideration the claimant's education, training, experience and

capacity for rehabilitation. Hughes v. Inland Container Corp., 247 Kan. 407, 414, 799 P.2d 1011 (1990).

Dr. Murphy, Dr. Ozanne, and Dr. Schlachter all expressed opinions on claimant's permanent functional impairment and permanent restrictions. Each of these physicians also expressed opinions on the question of whether the claimant had the physical ability to do any type of work. Dr. Murphy was not sure the claimant was totally disabled from any gainful occupation, but felt because of the claimant's multiple levels of back problems and his degenerative arthritis condition he would be difficult to employ. Dr. Ozanne opined that the claimant was completely disabled from any useful occupation. Dr. Ozanne recognized that the claimant could do some daily living activities but with his permanent restrictions of limited sitting and standing, he was not sure there was any particular work that claimant could do. After taking a complete history and examining the claimant, Dr. Schlachter's opinion was that the claimant was not physically capable of performing any kind of work.

In addition to the testimony of the physicians on this issue, claimant's attorney retained Jerry D. Hardin, M.S., Human Resource Consultant, to express an opinion on work disability. On July 12, 1993, Mr. Hardin personally interviewed the claimant and obtained information from him concerning his education, training and past work experience. He also had the benefit of medical reports from Dr. Schlachter, Dr. Murphy, and Dr. Ozanne. Utilizing Dr. Schlachter's permanent work restrictions, it was Mr. Hardin's opinion that the claimant's ability to perform work in the open labor market had been reduced by ninety to ninety-five percent (90-95%). Claimant's labor market loss was the same when Mr. Hardin utilized Dr. Murphy's permanent restrictions. When Mr. Hardin used Dr. Ozanne's permanent restrictions, he opined that the claimant had a one-hundred percent (100%) loss of ability to perform work in the open labor market. Mr. Hardin arrived at a seventy-six percent (76%) wage loss by comparing a pre-injury stipulated average weekly wage of \$846.67 to a post-injury average weekly wage of \$200.00. The \$200.00 post-injury wage is contingent on the claimant securing a job in the five to ten percent (5-10%) remaining labor market. Comparing these two figures, this would be a seventy-six percent (76%) comparable wage loss. If you utilized Dr. Ozanne's restrictions the claimant would have a one-hundred percent (100%) comparable wage loss.

The term "substantial and gainful employment" is not defined in the Kansas Workers Compensation Act. Prior to the recent case of Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993), the Kansas Appellate Courts had not provided such a definition. However, in this decision the Kansas Court of Appeals held:

"The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

The Appeals Board finds that the evidence in the record in this case establishes that the claimant, because of his work-related injuries, is permanently totally disabled. Claimant's severe work restrictions placed on him by the physicians, coupled with his age and previous work experience, renders him essentially and realistically unemployable. See Wardlow, *id.*

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated February 25, 1994, should be, and is hereby, affirmed as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Harley G. Norman, and against the respondent Cessna Aircraft Company, and its insurance carrier, Axia Services, Inc., and the Kansas Workers Compensation Fund, for an accidental injury which occurred January 1992 through June 30, 1992, and based on an average weekly wage of \$846.67.

The claimant is entitled to 40.29 weeks temporary total disability compensation at the rate of \$289 per week or \$11,643.81, followed by \$289 per week until \$113,356.19 is paid for a permanent total disability award of \$125,000.

As of May 19, 1995, there would be due and owing to claimant 40.29 weeks temporary total disability compensation at the rate of \$289 per week or \$11,643.81, followed by 110.14 weeks of permanent total compensation at \$289 per week in the sum of \$31,830.46 for a total due and owing of \$43,474.27, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance of \$81,525.73 is to be paid for 282.10 weeks at the rate of \$289 per week until paid in full or until further order of the Director.

All other orders of the Administrative Law Judge are herein adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas E. Hammond, Wichita, KS
Douglas C. Hobbs, Wichita, KS
Becky C. Hurtig, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director